IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-489

CITY OF WILLCOX AND
ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,
Respondents.

On a Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF EL PASO NATURAL GAS COMPANY IN OPPOSITION

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BRIEF OF EL PASO NATURAL GAS COMPANY IN OPPOSITION

El Paso Natural Gas Company hereby submits its brief in opposition to the Petition for a Writ of Certiorari which was filed by City of Willcox and Arizona Electric Power Cooperative, Inc. to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 30, 1977.

OPINION BELOW

The judgment and opinion of the Court of Appeals, not yet reported, is printed in Appendix A in the Petition for a Writ of Certiorari. Opinion No. 697 of the Federal Power Commission is reported at 51 F.P.C. 2053 and printed at Appendix C in the Petition for a Writ of Certiorari. The Commission's opinion and order denying rehearing of Opinion No. 697 (Opinion No. 697-A) is reported at 52 F.P.C. 1876 and printed at Appendix D in the Petition for a Writ of Certiorari. Relevant excerpts of the Commission's order of October 15, 1976, clarifying and further modifying Opinion Nos. 697 and 697-A, not yet reported, is printed in Appendix A, *infra*. The Commission's order of June 1, 1977, implementing the curtailment plan prescribed in Opinion Nos. 697, 697-A and subsequent clarifying orders, also not yet reported, is similarly exerpted and set forth in Appendix B, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1977 and rehearing was denied by order dated August 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

STATUTES INVOLVED

Sections 4, 5 and 19 of the Natural Gas Act, 15 U.S.C. §§ 717(c) 717(d), and 717(r) are set forth in Appendices E, F, and G, respectively, of the Petition for a Writ of Certiorari. Section 21 of the Natural Gas Act, 15 U.S.C. § 717(t), is set forth in Appendix C, *infra*.

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly sustained the Federal Power Commission's approval of a methodology for collecting customer end-use data on the El Paso natural gas system which is based upon estimates of actual end-uses of gas submitted by El Paso's customers.
2. Whether the Court of Appeals properly sustained the Federal Power Commission's relegation of El Paso customer requirements for gas utilized as boiler fuel in electric power generation to the lowest curtailment priorities.

STATEMENT OF THE CASE

This court is asked by Petitioners to review certain aspects of Opinion Nos. 697 and 697-A of the Federal Power Commission ("Commission"), as sustained by the United States Court of Appeals. Opinion Nos. 697 and 697-A establish a curtailment plan to be followed by El Paso Natural Gas Company ("El Paso") to allocate natural gas among customers served by its interstate gas pipeline system during periods of gas shortage. El Paso serves both direct sale and distributor customers in California and in several states east of California. Petitioner City of Willcox is an east-of-California gas distributor which purchases natural gas from El Paso for resale to ultimate consumers. Petitioner Arizona Electric Power Cooperative, Inc. is a resale customer of City of Willcox. Respondent Federal Energy Regulatory Commission is the successor agency of the Federal Power Commission.

This case commenced before the Federal Power Commission in July, 1971, when El Paso tendered for filing and acceptance by the Commission certain pro-

posed revisions in its tariff intended to establish a permanent curtailment plan to govern the allocation of its available gas supply during periods of shortage. In August, 1972, El Paso requested that the Commission issue an interim curtailment plan, to be effective pending implementation of the permanent plan. On October 31, 1972, the Commission issued Opinion No. 634 [1] (R. 13355-13368), which established an interim plan based on five end-use curtailment priorities. Included in the lowest two priorities prescribed by the interim plan were "industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day" (Priority 4), and "industrial requirements for large volume (in excess of 3,000 Mcf per day) boiler fuel use" (Priority 5). (R. 13366) Under the interim plan all requirements for gas within Priority 5 were to be completely curtailed before any curtailment could be imposed in Priority 4, and so on, up through the five-priority hierarchy. Within each priority, curtailment was to be *pro rata.*

The Commission also found in Opinion No. 634 that "[i]mplementation of our plan will require certain market data . . ." and that "El Paso shall secure all data necessary to effectuate compliance herewith. . . ." (R. 13368) Proposed tariff sheets filed by El Paso in compliance with Opinion No. 634 required all customers of El Paso to "schedule" daily gas deliveries, by priority classification, in quantities which were not to exceed a maximum daily delivery obligation established by reference to existing purchase contracts. (R. 13749) In Opinion No. 634-A,[2] the Commission

[1] 48 F.P.C. 939 (1972).

[2] 48 F.P.C. 1371 (1972).

clarified this daily scheduling provision by stating that the basis for measuring curtailments should be "daily requirements" for gas whenever such actual requirements are less than the maximum daily delivery obligation. (R. 13749) In November, 1972, El Paso commenced maintaining records of each of its customer's daily scheduled "requirements" under the Opinion No. 634 plan. That plan, as reflected in El Paso's tariff, was made effective by the Commission on December 15, 1972.

On January 21, 1974, the United States Court of Appeals for the District of Columbia Circuit issued its Opinion in *American Smelting and Refining Company* v. *FPC,* 494 F.2d 925, *cert. denied,* 419 U.S. 882 (1974), herein cited as *ASARCO,* affirming in part and reversing and remanding in part the interim curtailment plan established in Opinion No. 634. Among the deficiencies in the interim curtailment plan found by the Court in *ASARCO* was the Commission's failure in Opinion Nos. 634 and 634-A to articulate reasons, based on substantial evidence, for its subordination of large boiler fuel requirements. However, the Court permitted the interim plan to remain in effect pending the correction by the Commission of this and other deficiencies on remand.

On June 14, 1974, the Commission issued Opinion No. 697,[3] which established a "permanent" curtailment plan for El Paso substantially identical to the Opinion No. 634 plan. The plan prescribed in Opinion No. 697 retained the five-category end-use priority sys-

[3] Opinion No. 697 is printed in Appendix C, at page A-75, of the Petition for a Writ of Certiorari. [hereinafter referred to as Petition]

tem and again placed boiler fuel use in excess of 1,500 Mcf on a peak day in Priorities 4 and 5, with a 3,000 Mcf peak day volumetric dividing line between those two priority classifications. (Petition A-85) Opinion No. 697 also limited the quantity of natural gas which each customer could request or "schedule" from El Paso in each priority category during each calendar month to that quantity it required in each category during the same month in the twelve-month period ending October 31. 1972. (Petition A-98) Finally, the Commission articulated in Opinion No. 697 specific findings, based on evidence compiled during hearings on the interim curtailment plan, supporting the subordination of large boiler fuel requirements to all other end-use requirements for purposes of allocating El Paso's available gas during periods of shortage. (Petition A-91-92)

The Commission issued Opinion No. 697-A (Petition A-125) on December 19, 1974 in response to various petitions for rehearing of Opinion No. 697 and to comply with the court's remand in *ASARCO*. Opinion No. 697-A modified the "permanent" curtailment plan prescribed in Opinion No. 697 and further provided that the plan, as modified, would ultimately be made effective as a "revised interim plan" subject to such additional modifications as might be required upon completion of an environmental impact statement and further evidentiary hearings on environmental impact. (Petition A-151) In Opinion No. 697-A, the Commission also revised the base-period volumetric limitations imposed in Opinion No. 697 by requiring that a "schedule of requirements" and seasonal "end-use profiles" be constructed for each customer reflecting the annualized effect of growth

in Priority 1 and 2 gas requirements through October 31, 1974. The Commission instructed El Paso to construct the necessary schedules and end-use profiles from data gathered from its customers during the administration of the interim curtailment plan. (Petition A-132)

Pursuant to Opinion No. 697-A, El Paso tendered to the Commission proposed tariff sheets containing a "schedule of requirements" and "end-use profiles" based upon customer supplied data reflecting actual daily requirements in the various end-use categories. Subsequent orders clarifying and further modifying the revised interim curtailment plan prescribed in Opinion Nos. 697 and 697-A were issued by the Commission on December 24, 1975 and October 15, 1976. On June 1, 1977, the Commission ordered that El Paso's proposed tariff sheets implementing the revised interim curtailment plan be made effective commencing July 1, 1977. On June 30, 1977, the Court of Appeals issued the opinion below sustaining both the end-use data collection methodology reflected in the revised interim curtailment plan and that plan's relegation of large volume boiler fuel use to Priority 5, the lowest curtailment priority.

REASONS FOR DENYING THE WRIT

The Court of Appeals properly sustained the Commission's approval of the methodology for collecting end-use data reflected in the revised interim curtailment plan. As the proponents of a different methodology for collecting end-use data, Petitioners have failed to allege specific instances of erroneous reporting under the present methodology, and have failed to avail themselves of the proper procedures for presenting such a claim. Moreover, Petitioners have no

valid grounds for attacking the expert judgment of the Commission that a more elaborate data-collecting methodology would impose onerous burdens on the parties involved, a judgment which the court below suggested would be neither arbitrary nor capricious. Petitioners' argument that the Commission's judgment cannot be supported by record evidence is spurious since that argument is no more than a plea that Petitioners' judgment concerning the reliability of data collected under the present procedures be substituted for the Commission's own expert judgment.

The Court of Appeals properly sustained the Commission's subordination of boiler fuel use to other end-uses of natural gas on the El Paso system. Evidence underlying the Commission's findings on boiler fuel use was introduced and ultimately relied upon to resolve this single issue. The Court of Appeals sustained these findings on the basis of the same reasoning as that articulated by the Commission. The court below also properly found that the related issue of contract abrogation was resolved by the Commission in a manner that is consistent with that court's prior holding in *American Smelting and Refining Company* v. *FPC*, 494 F.2d 925, 935-36, *cert. denied* 419 U.S. 882 (1974) and with this Court's decision in *FPC* v. *Louisiana Power and Light Company*, 406 U.S. 621, 646 (1972).

Finally, the decision below is fully consistent with the procedural requirements and with the underlying purpose the Natural Gas Act. Despite its manifest correctness, however, the decision will have only a limited application to pending or future curtailment plans prescribed for other pipelines. This is so simply because the revised interim curtailment plan, as sustained by the Court of Appeals, was tailored by the

Commission to the unique circumstances affecting the allocation of natural gas on the El Paso system.

1. The Court of Appeals Properly Sustained the Commission's Approval of the Methodology for Collecting End-Use Data Reflected in the Revised Interim Curtailment Plan.

Petitioners assert that the Commission's approval of the methodology for collecting customer end-use data reflected in the revised interim plan is neither supported by record evidence nor otherwise justified. On the basis of these assertions, Petitioners argue that the Court of Appeals "unlawfully" sustained the Commission's acceptance of El Paso's data collection methods.

Petitioner's assertion that the end-use data collected by El Paso is deliberately overstated by its customers and results in fictitious gas shortages is purely conjectural and has no basis in fact. El Paso has been collecting what it believes to be valid end-use data since November, 1972, under tariff provisions requiring its customers to report actual daily gas requirements in the five prioritized end-use categories which were effective under the former, interim curtailment plan and which continue to be effective under the present, revised curtailment plan. El Paso's tariff provisions implementing the revised interim curtailment plan, as approved by the Commission, limit the quantity of gas which each of El Paso's customers may schedule from El Paso in each priority, on each day, to an amount not exceeding that customer's "estimate of its actual needs in such priority on that day."[4] In order to verify that gas so scheduled or

[4] EL PASO NATURAL GAS COMPANY, FPC Gas Tariff, Original Volume No. 1, Substitute First Revised Sheet No. 63-B, Section 11.3(e)(iii)(2), effective July 1, 1977.

"nominated" for use in each end-use category is actually distributed for such use, El Paso's tariff requires that each customer "furnish [El Paso] with a report, based upon [that customer's] best information and belief, of end-use data not later than 60 days subsequent to the end of each month's deliveries of gas."[5] These tariff provisions have all been made effective by Commission order,[6] the willful violation of which renders the offender both criminally and civilly liable under Section 21 of the Natural Gas Act. (App. C)

Since the issuance of Opinion Nos. 697 and 697-A, the Commission has considered numerous protests and comments filed by the various parties to the proceedings below on the mechanics of implementing the revised interim curtailment plan, and has issued appropriate clarifying orders. The Commision has repeatedly denied Petitioners' requests that El Paso's customers be subjected to more stringent reporting requirements or hearings on the validity of their nominations in each end-use category. The Commission's reasons for such denial have been clearly articulated in its relevant orders and opinions. The Commission has stated that, in the absence of specific allegations of error or impropriety regarding the reporting of end-use data, any request for hearings on the validity of such data will be denied. (App. A) The Commis-

[5] EL PASO NATURAL GAS COMPANY, FPC Gas Tariff, Original Volume No. 1, Substitute First Revised Sheet No. 63-D, Section 11.7, effective July 1, 1977.

[6] *See* Federal Power Commission, "Order Denying Rehearing and Accepting Tariff Sheets," issued June 1, 1977, excerpted at Appendix B, *infra*. [references to Appendices contained *infra* are hereinafter cited as App.]

sion has further stated it "remains unconvinced" that a requirement for reporting end-use data on a "consumer-by-consumer" basis would lead to any improvement in the data which would outweigh the burden on "distributor customers of El Paso to produce verified, actual burner-tip end-use reports." (App. B)

The Court of Appeals correctly pointed out in the decision below that Petitioners' proper course of action to contest the validity of end-use data reports submitted to El Paso would be to file a formal complaint alleging a violation of El Paso's tariff under Section 5(a) of the Natural Gas Act. (Petition A-163) Section 1.6(b) of the Commission's Rules of Practice and Procedure requires that such a complaint contain "a statement of the facts forming the basis for the conclusion that there has been a violation of an . . . order issued by the Commission."[7] Petitioners have failed to avail themselves of this remedy and, indeed, have failed to state any facts in the instant petition which could constitute the basis of a formal complaint.

In this regard, Petitioners' argument that the Court of Appeals erroneously shifted the burden of proving the invalidity of end-use data from the Commission to Petitioners by requiring a showing of specific errors in such data as a condition precedent to a hearing is clearly without merit. Petitioners' assertion that the burden of proving the validity of end-use data rests in the first instance with the Commission apparently refers to the requirement of Section 7(c) of the Administrative Procedure Act ("APA") that

[7] Federal Power Commission, Rules of Practice and Procedure, 18 C.F.R. § 1.6(b) (1977).

"the proponent of a rule or order shall have the burden of proof."[8] Petitioners reliance on the APA is misplaced, however, since the framers of that Act specifically cautioned that "the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a *prima facie* case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain."[9]

In the case below, it is not disputed that the Commission made the requisite finding that a curtailment plan based on end-use is appropriate and necessary for El Paso's natural gas system. Consequently, the burden of coming forward with evidence showing the impropriety of any action prescribed by the Commission for implementing such a plan properly lies with the parties raising that objection. *See National Airlines, Inc.* v. *CAB,* 300 F.2d 711 (D.C. Cir. 1962). This is especially the case when, as here, the right to raise objections to the implementation of Commission orders is not cut off by the termination of the relevant proceedings. Petitioners or any other party may at any time file a formal complaint under Section 5(a) of the Natural Gas Act alleging specific errors in El Paso's end-use data.

The court below correctly recognized that the Commission's expert judgment regarding matters of methodology and logistics in the implementation of its orders should be accorded a good deal of respect. As noted above, the Commission has indicated that its decision regarding the appropriateness of El Paso's data collection methodology was based in part on its con-

[8] 5 U.S.C. § 556(d) (1970).

[9] Sen. Doc. No. 248, 79th Cong., 2d Sess. 208, 270 (1946).

sidered judgment that a more burdensome methodology had not been shown to be necessary to yield accurate end-use data. In *Market Street R. Co.* v. *Railroad Com. of Cal.,* 324 U.S. 548, 560, (1945), this Court held that it is not a denial of due process for an agency experienced with the affairs of the parties to an adjudicatory proceeding to make predictive conclusions about the effect of agency actions on those parties, despite the fact that such conclusions "do not follow any particular testimony."[10] The record in the proceedings below reveals that El Paso's distributor customers serve many thousands of consumers who use natural gas for a great variety of end-uses. (R. 1599, 1600, 1601, 1629, 1638, 1899) Considering this record as a whole, the Court of Appeals properly found that the Commission was acting neither arbitrarily nor capriciously in deciding not to require consumer-by-consumer end-use reports which would be subject to cross-examination.

Nor can Petitioners rely on this Court's decision in *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U.S. 291, 300-305 (1973) in arguing that the Commission's approval of El Paso's data collection methodology was based on "mere administrative fiat" which denied Petitioners the right to a fair hearing. In *Ohio Bell Telephone,* this Court reversed an agency decision on the grounds that data basic to the agency's judgment was withheld from the record. The Court of Appeals pointed out in the case below, however, that "[i]t is not as though the Commission wishes El Paso to proceed without any data at all." (Petition A-537) Indeed, the end-use data at issue in this case has been fully included in the record of the Commission's pro-

[10] 324 U.S. 560.

ceedings, as has a description of the precise methodology followed by El Paso in collecting it. Petitioners would appear to argue that because Petitioners allege that El Paso's data is invalid, the Court of Appeals should have considered the record completely void of such data, thus substituting Petitioners' judgment for that of the Commission. This is indeed a spurious argument for granting a petition for certiorari review.

2. The Court of Appeals Properly Sustained the Commission's Subordination of Boiler Fuel Use to Other End-Uses of Gas Provided for in El Paso's Curtailment Plan.

The court below found that two of the reasons articulated by the Commission for relegating large boiler fuel requirements to the lowest two end-use categories under El Paso's revised interim curtailment plan were supported by substantial record evidence. Petitioners argue that the court erred in finding such evidence sufficient to sustain the Commission's reasoning.

Petitioners argue first that the evidence relied upon by the Commission for the subordination of large boiler fuel requirements pertains only to the priorities accorded end-uses under El Paso's interim curtailment plan and, as such, cannot be used as support for the revised interim plan at issue in the case below. In advancing this argument, Petitioners rely on *NLRB* v. *Johnson*, 332 F.2d 216 (6th Cir. 1963), a case involving the introduction of evidence bearing on matters not alleged in a complaint but later used as the basis of agency findings on the complaint. In the case below, the Commission evaluated El Paso's interim curtailment plan and the subsequent revised interim plan during the course of a single, extended adjudicatory proceeding. Evidence introduced during that proceeding was relied upon by the Commission to resolve the same issue of

boiler fuel use for purposes of both curtailment plans. There is no reason to believe that Petitioners misunderstood the relevance of this evidence to the boiler fuel issue, or that they misunderstood or were denied the opportunity to litigate that issue. Thus, there is no merit to Petitioners' argument. *See NLRB* v. *MacKay Radio & Teleg. Company*, 304 U.S. 333, 350 (1938).

Petitioners also argue that by basing the lowest curtailment priorities prescribed under El Paso's curtailment plan on aggregate volumes of gas utilized for boiler use rather than on the relative size of boiler units the Commission disregarded the "efficiency-of-scale" concept which constituted the evidentiary support for its subordination of boiler fuel. This is a frivolous argument. The Commission simply found that the largest boilers use the greatest volumes of gas and accordingly assigned curtailment priorities for boiler use on the basis of the daily volumes of gas required for such use. The Commission's action represents nothing more than a reasonable application of its "efficiency of scale" rationale.[11] As such, it should not be vulnerable to hypothetical or hypertechnical objections such as Petitioners' claim that a non-boiler fuel user might take more gas on a given day than a boiler fuel user while still enjoying a superior priority classification. As this Court stated in *Penn-Central and N&W Inclusion Cases*, 389 U.S. 486, 526 (1968), it is not the Court's province "to second-guess each step in the Commission's process of deliberation."

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[11] In Opinion No. 697, the Commission stated:

"We recognize that any number of gradations related to size may have been possible, however, in our judgment, the cut-off points established in Priorities 4 and 5 will result in the very largest boilers being curtailed first, with, correspondingly, the maximum initial displacement of natural gas." (Petition A-92).

Finally, Petitioners argue that in sustaining the Commission's subordination of large boiler fuel requirements the Court of Appeals unlawfully disregarded Petitioners' "right to retain the contractual preference of firm customers over interruptible customers." The court below, however, pointed out that it had already decided this issue with respect to El Paso in *American Smelting and Refining Company* v. *FPC*, 494 F.2d 925, 935-36, *cert. denied*, 419 U.S. 882 (1974), where it upheld "[b]oth the legal permissibility of relying on end-use as an allocative scheme and the substantiality of the evidence underlying the FPC's choice of the end-use method on the El Paso system." (Petition A-48) The court below also relied on this Court's decision in *FPC* v. *Louisiana Power and Light Company*, 406 U.S. 621, 646 (1972), wherein it was held that the Natural Gas Act fully authorizes a pipeline's tariff to impose a curtailment plan which is contrary to, and overrides, the terms in existing contracts to the extent such inconsistent contractual provisions result in undue discrimination or preference between customers having like end-uses. Petitioners' argument that the decision below conflicts with decisions of the United States Court of Appeals for the Fifth Circuit involving the United Pipe Line Company has no relevance here, despite Petitioners allegations that those decisions "distinguished between the evidence necessary to subordinate boiler fuel and that required to overturn a contractual curtailment priority." Evidence underlying United Gas Pipe Line Company's curtailment plan is simply of no consequence to curtailment on the El Paso system.

Petitioners rely on various policy arguments in urging this Court to reassess the position the Commission has taken with respect to the use of natural gas

as boiler fuel. The determination of government policy to be carried out through the administration of the Natural Gas Act, however, is the province of the Commission rather than of the courts. *See Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968). The court below, therefore, correctly limited its review of the Commission's application of its boiler fuel policy to El Paso's curtailment plan to a consideration of whether that policy, as implemented, was arbitrary and capricious in light of the underlying evidence.

3. The Decision of the Court of Appeals Involves Unique Facts Which Are of Limited Importance to the Administration of the Natural Gas Act.

Despite its manifest correctness, the decision of the court below will have only a limited application to pending or future curtailment plans prescribed for other pipelines. As such, the court's decision does not pose significant federal questions involving the administration of the Natural Gas Act.

The Court of Appeals correctly pointed out in the case below that "on a matter of logistics rather than a rule of law, or even an agency's interpretive policy, the need to enforce consistency is much reduced." (Petition A-53) The Commission has not attempted to promulgate rules of general application respecting a particular methodology for collecting data on the end-uses of gas delivered and sold under its jurisdiction. In the absence of such rules, the Commission should be free to consider the proper methodology for collecting end-use data as a matter which is unique to each pipeline and which should be decided on a case-by-case basis. As the court noted in *City of Chicago* v. *FPC*, 458 F.2d 731, 743-43 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972):

> The ability to choose with relative freedom the procedure it will use to acquire relevant information gives the Commission power to realistically tailor the proceedings to fit the issues before it, the information it needs to illuminate those issues and the manner of presentation which, in its judgment, will bring before it the relevant information in the most efficient manner.

Thus, the ruling of the Commission regarding the collection of end-use data on the El Paso system, as sustained by the Court of Appeals, should have no extensive ramifications or application beyond the administration of El Paso's unique curtailment plan.

The court below also noted that the Commission's relegation of large boiler fuel requirements to the lowest curtailment priorities prescribed in the revised interim curtailment plan, without regard to firm and interruptible contractual distinctions, represents a modification of the Commission's boiler fuel policy specifically designed to accommodate the unique circumstances created by state regulatory limitations affecting El Paso's California customers. The Commission's decision to treat virtually all contractual entitlements among El Paso's customers as firm for curtailment purposes was properly sustained by the Court of Appeals as falling within the scope of Commission discretion and consistent with this Court's holding in *FPC* v. *Louisiana Power & Light Co.,* 406 U.S. 621, 646 (1972), that a pipeline's tariff may impose a curtailment plan despite contrary terms in existing contracts. The specific nature of the "abrogation of contractual rights" complained of by Petitioners is, of course, limited to El Paso's customers and has no application beyond El Paso's curtailment plan. As such, the issue

of subordination of large boiler fuel requirements in abrogation of contractual rights under the unique circumstances found to exist on El Paso's system is not an important federal question.

CONCLUSION

For the foregoing reasons, the petition of City of Willcox and Arizona Electric Power Cooperative, Inc. for a writ of certiorari presents no question warranting review of the decision below and should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

EL PASO NATURAL GAS COMPANY

Docket No. RP72-6

Order Denying Rehearing, Further Clarifying Opinions, and Requiring Modification of Proposed Tariff Sheets

(Issued October 15, 1976)

On December 24, 1975, we issued an order clarifying Opinion Nos. 697 and 697-A and requiring modification of the proposed tariff sheets filed by El Paso Natural Gas Company ("El Paso") on April 11, 1975, to comply with the two Opinions. On February 23, 1976, El Paso tendered for filing revised tariff sheets to comply with the order of December 24, 1975. Requests for rehearing of the order of December 24, 1975, and protests to or comments on the February 23, 1976, submissions of El Paso have been filed as indicated in the appendix to this order.[1]

TREATMENT OF STORAGE VOLUMES

The Petition for Rehearing of the order of December 24, 1975, filed by AEPCO raises three objections to the treatment of storage volumes in El Paso's tariff sheets. AEPCO objects to (1) El Paso's calculation of its customers' storage injection volumes; (2) the Priority 3 treatment of winter storage injection volumes, and (3) the treatment of El Paso's own storage volumes. AEPCO also renews its request for a hearing on the end-use data underlying El Paso's present method.

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[1] Order Granting Rehearing for Further Consideration was issued February 20, 1976.

• • •

AEPCO's request for a hearing concerning the validity of the end-use data underlying El Paso's calculation of its customers' storage injection volumes is again denied. In view of the continued failure to present allegations of error or impropriety respecting the end-use data, the request smacks of a desire for a fishing expedition rather than of information and belief that a situation exists requiring corrective action.

• • •

SIXTY-DAY DISTRIBUTOR REPORTING REQUIREMENT

The proposed Original Volume No. 1, Substitute First Revised Sheet No. 63-D, § 11.7, requires distributors to provide El Paso with actual end-use data within 60 days from the end of each month. Southwest and SoCal Gas object to this provision. Since adjustments to the permanent curtailment plan may be necessary, the gathering of end-use data during the operation of the plan appears to be an appropriate and desirable function. We agree with SoCal Gas, however, that the requirement that "actual" end-use data may impose an onerous burden. The proposed tariff should, therefore, be modified to require end-use data to be reported to the best of a distributor's information and belief.

APPENDIX B

CURTAILMENT PLAN; REHEARING DENIED; ACCEPTABLE FOR FILING

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

EL PASO NATURAL GAS COMPANY

Docket No. RP72-6

Order Denying Rehearing and Accepting Tariff Sheets

(Issued June 1, 1977)

Applications for rehearing of our order issued October 15, 1976,[1] were timely filed by Pacific Gas and Electric Company ("PG&E") and by the City of Willcox and Arizona Electric Power Cooperative, Inc. ("AEPCO"). On December 13, 1976, an order was issued granting rehearing for further consideration of the issues raised by these applications which were summarized in the order.

On November 22, 1976, El Paso Natural Gas Company ("El Paso") tendered for filing tariff sheets purportedly conforming to our October 15, 1976, order. On December 16, 1976, Southwest Gas Corporation ("Southwest") filed a protest to the tendered tariff sheets objecting to an excessive reduction of its Priority 5 end-use profile requirements as a result of reclassifying ignition fuel and flame stabilization requirements. Southwest also objected to El Paso's statement of the anticipated operation of its plan by which it would still limit nominations and entitlements by priority contrary to our rejection of such operation in the orders

[1] "Order Denying Rehearing, Further Clarifying Opinions, And Requiring Modification Of Proposed Tariff Sheets".

issued October 15, 1976, and December 24, 1975.[2] On February 18, 1977, El Paso tendered revised proposed tariff sheets incorporating Southwest's requested revision of its Priority 5 end-use profile requirements and similarly correcting El Paso Electric Company's end-use requirements.

After consideration of the applications for reconsideration, we find it necessary to deny the applications. Although El Paso's explanation contained in its November 22, 1976, compliance submissions of its procedures for implementing the curtailment plan prescribed by Opinion Nos. 697 and 697-A requires correction, we see no further impediment to the implementation of the curtailment plan by acceptance of the latest compliance tariff sheets.

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60 Day Distributor Reporting Requirement

The October 15, 1976, order changed the basis of reports on the end-use of gas by distributors to be made to El Paso within 60 days after the clase of the month from "actual end-use data" to "best of information and belief". AEPCO argues that consumer-by-consumer actual end-use data would be better for purposes of reviewing the operation of the curtailment plan. AEPCO, however, fails to deal with the burden that would be placed on distributor customers of El Paso to produce the verified, actual burner-tip end-use reports contemplated in the previous tariff provision. We remain unconvinced that the improvement in the data would outweigh such a burden.

[2] Similar protests were filed by City of Mesa, Arizona.

APPENDIX C

United States of America
Federal Power Commission

NATURAL GAS ACT

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General Penalties

Sec. 21. (a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this act required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this act, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs. [52 Stat. 833 (1938); 15 U.S.C. § 717t]

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